IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

CRL.A.No. 649 of 2003()

SC.232/2000 of ADDL.SESSIONS COURT (ADHOC), KASARAGOD

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APPELLANT: ACCUSED

KARAKUZHIYIL NARAYANAN, S/O. MALINKAN,
UNNIRAMANTE MADA, CHEEMENI, CHEEMENI VILLAGE.

BY ADV. SRI.M.THAMBAN
SMT.T.SUDHAMANI

RESPONDENTS: COMPLAINANT & STATE

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1. THE STATION HOUSE OFFICER,
CHEEMANI POLICE STATION.

2. THE STATE OF KERALA REP.BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 649 OF 2003

Dated this the 22nd February, 2007.

J U D G M E N T

The accused in S.C.No.232/2000, on the file of the Additional Sessions Court, (Ad hoc-I), Kasargod, is the appellant. He was found guilty of the offence punishable under Section 55(g) of the Abkari Act, in short 'the Act', and, therefore, was convicted and sentenced thereunder to undergo rigorous imprisonment for three years, and also to pay a fine of Rupees One Lakh, in default, to undergo rigorous imprisonment for a further period of six months. The same is under challenge through this appeal.

2. The brief prosecution case is that, Pws.1 and 5 along with others, have found the appellant carrying 15 litres of wash, in M.O.1 tin, on 26.8.1998, at about 19.30 hours, at Cheemani Village. The appellant was, therefore, proceeded according to the law. Ext.P1 is the seizure mahazar prepared by PW.5, the Sub Inspector of Police, and attested by PW.2. Ext.P2 is the scene mahazar attested by PW.3. Ext.P4 is the F.I.R. registered by PW.5. The same was sent for chemical analysis, and Ext.P6 is the report, which reveal that two

samples collected from the wash, contained 11.75 and 26.78 percent by volume of Ethyl Alcohol. Therefore, on filing of the final report, the Sessions Court framed charge against the appellant, under Section 55 (g) of the Act.

3. The prosecution examined five witnesses and marked six documents. M.O.1 was also brought into evidence and identified.

4. The learned counsel appearing for the appellant submitted that there was no actual seizure of the materials, as alleged by the prosecution, from the possession of the appellant. Counsel further contends that the place of occurrence itself is wrong, as the distance spoken to from the place of occurrence by Pws.2, 3 and 4 are entirely different than the distance spoken to by the departmental witnesses, PWs. 1 and 5. There is also difference in the mode of seizure and the conduct of PWs. 1 and 5. Yet another contention of the learned counsel is that though the sample is taken, as spoken to by PWs. 1 and 5, from the very same wash, which was allegedly detected by PW.5, from the possession of the appellant, the percentage by volume of ethyl alcohol, in each sample, is at variance,

and, therefore, the sample that was sent for chemical analysis was not from the wash that is alleged to have been seized. Counsel further submits that Ext.P6 report containing the percentage of ethyl alcohol in the sample strengthens the contention that there was no actual seizure of any wash from the possession of the appellant.

5. I have gone through Ext.P6 chemical analysis report. As stated above, ethyl alcohol contained in two samples are 11.75 and 26.78 percent by volume. There is no explanation available from PW.5, as to how this variation came, except deposing that he took the two samples from the same M.O.1 container, having wash in it. It is here the contention of the counsel that the samples must have been taken from some other quantity of wash, otherwise than as seized from the appellant, gains importance.

6. I am not immediately inclined to give the benefit of doubt, on the strength of difference in the percentage of volume of ethyl alcohol in the samples. However, I am of the view that an opportunity should be given to the prosecution, as prayed before this Court, to explain how the difference came.

7. The grievance of the appellant is that the lower court have considered only the prosecution version, and did not consider the defence version at all. Counsel submitted, as stated above, regarding the difference in the mode of seizure, alleged by Pws.1 and 5.

8. In the above facts situation, instead of instantly jumping into a conclusion in favour of the accused, I accept the plea of the prosecution, and inclined to give an opportunity to the prosecution to explain those points raised by the appellant before this Court.

9. In order to give justice to both sides, I set aside the impugned judgment of the court below, dated 22.3.2003, and remit the case, S.C.No.232/2000, to the file of the Additional Sessions Court, (Ad hoc-I), Kasargod.

10. The learned Sessions Judge shall given an opportunity to both sides to contest the matter by adducing fresh evidence, if they are so advised. This shall be done, and the case disposed of, according to law, within four months from the date of appearance of the appellant before that court.

11. The parties shall appear before the court below on 26.3.2007.

The Registry shall return the lower court records immediately to that court.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No.649 of 2003

J U D G M E N T

Dated: 22nd February, 2007.